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MICHAEL RODAK, JR., C

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-353

DR. EDWARD F. SCHUBERT,
Petitioner,

v.

MICHAEL JOHN KOVACH, JR.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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NATURE OF THE CASE

The petitioner has heretofore filed a petition for writ of certiorari to the Wisconsin Supreme Court. The petitioner seeks review of the judgment of the Supreme Court of Wisconsin declaring the provisions of sec. 971.17 (1), Wis. Stats., which provide for the automatic commitment of those found not guilty of a crime by reason of mental disease or defect, to be violative of the United States Constitution.

The respondent has filed a brief in opposition to the petition for writ of certiorari. In part I of his argument in such

brief the respondent sets forth an argument not previously raised. Therefore, this brief is submitted in response to that argument pursuant to Rule 24 (4) of the Rules of the Supreme Court of the United States.

ARGUMENT

The Petitioner Ought Not Be Precluded On The Grounds Suggested By The Respondent From Seeking A Writ Of Certiorari To Review The Judgment Of The Wisconsin Supreme Court Herein.

The respondent contends that "the petitioner lacks standing to seek review of the order denying the petition for a writ of habeas corpus." In support of that contention he cites the rule stated by this Court in *Electrical Fittings Corporation v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939):

> "A party may not appeal from a judgment or decree in his favor, for the purpose of obtaining a review of findings he deems erroneous which are not necessary to support the decree."

The respondent argues that that rule precludes the petitioner from seeking review of the judgment of the Wisconsin Supreme Court herein since that court's denial of the respondent's petition for a writ of habeas corpus constituted a judgment in favor of the petitioner from which the petitioner cannot appeal.

In making that argument the respondent overlooks the fact that the judgment of the Wisconsin Supreme Court in this case did more than simply deny to the petitioner a writ of habeas corpus. The judgment in this case provided as follows:

> "*By the Court.* — The provisions of sec. 971.17 (1), Stats., providing for automatic commitment without a hearing to determine present mental state and need for commitment, violate the equal protection and due process clause of the United States Constitution; determination of present mental illness shall be made in all prosecutions either pending or not instituted; other relief denied to this petitioner" (Appendix to Petition for Writ of Certiorari, pp. 112-113).

That judgment contains three provisions: 1) a declaration that the provisions of sec. 971.17 (1), Wis. Stats., providing for automatic commitment of persons found not guilty by reason of mental disease or defect, are unconstitutional;/[1] 2) a declaration that a hearing with respect to present mental illness was necessary in the future before any such commitment could be effected;/[2] and 3) a denial of other relief to the respondent herein./[3]

The petitioner seeks review by this Court of the first two provisions of the judgment. Those provisions of the judgment are clearly not in the petitioner's favor. The respondent, not the petitioner, was the prevailing party with respect to those two provisions of the judgment.

Therefore, the rule stated in *Electrical Fittings Corporation v. Thomas & Betts Co., supra,* which precludes appeal by a successful party, has no application to the petitioner's request for a writ of certiorari to review the judgment of

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/[1]While this case was an original action for a writ of habeas corpus in the Wisconsin Supreme Court, it is clear from the judgment set out above that the court treated such action, at least in part, as an action for declaratory judgment.

/[2]See fn. 1, *supra.*

/[3]It is noteworthy that in denying "other relief" to the respondent, the Wisconsin Supreme Court plainly implied its view that in the first two parts of its judgment it had granted relief to the respondent.

the Wisconsin Supreme Court. The petitioner, who was clearly the losing party with respect to those provisions of the judgment which he requests this Court to review, is not foreclosed by that rule from seeking such writ in this case.

It should be noted that if the petitioner were precluded in this case from obtaining review of the Wisconsin Supreme Court's declaration of the constitutional invalidity of sec. 971.17 (1), Wis. Stats., in all probability it would not be possible for the petitioner or any other interested party to obtain such review of that declaration by this Court in any future case. The trial courts of the state of Wisconsin can be expected to abandon the statutory procedures declared unconstitutional in this case and to comply with the new procedures mandated by the Wisconsin Supreme Court. Therefore, the opportunity to test the constitutional validity of those statutory procedures will in all likelihood never arise again.

In summary, the petitioner ought not be precluded on the grounds suggested by the respondent from obtaining a writ of certiorari to review the judgment of the Supreme Court of Wisconsin in this case. The petitioner was clearly the losing party with respect to those provisions of the judgment which he requests this Court to review. Furthermore, this case in all probability offers the only opportunity to obtain this Court's review of the Wisconsin Supreme Court's declaration that sec. 971.17 (1), Wis. Stats., is violative of the United States Constitution.

CONCLUSION

For these reasons and for the reasons heretofore set forth in the petition for writ of certiorari, the petitioner respectfully requests that this Court grant his petition for writ of certiorari to review the judgment of the Wisconsin Supreme Court herein.

Respectfully submitted,

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